Supreme Court, U.S.
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No. ____

In The
Supreme Court of the United States

COLUMBIA IRON & METAL CO.,
Petitioner,

v.

LINCOLN ELECTRIC COMPANY, AND
PROFILE GRINDING, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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January 15, 2009

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QUESTIONS PRESENTED

1. Where a jury is instructed on two different bases for tolling the statute of limitations, one of which is clearly erroneous and the other of which is deemed acceptable, may the verdict stand because the jury "could have" followed the acceptable instruction even though the court is unable to find that the jury did not instead follow only the erroneous instruction?

2. May a trial court omit a Rule 23(c)(2)(B) notice to absent class members in a Rule 23(b)(3) class action and thereafter substitute a partial settlement notice under Rule 23(e)(1)(B) without including the admonition specified in Rule 23(c)(2)(B) that a subsequent judgment in the continuing litigation against the non-settling defendants would be binding on the class members?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Defendant–Appellant and Petitioner: Columbia Iron & Metal Co.

Plaintiffs-Appellees and Respondents: Lincoln Electric Company and Profile Grinding, Inc. as representatives of a class of generators of ferrous scrap in Cuyahoga, Lake, Lorain, Medina, Summit, Stark and Ashtabula counties in the State of Ohio from December 1992 to March 2000.

CORPORATE DISCLOSURE STATEMENT

The parent corporation of Petitioner Columbia Iron & Metal Co. is Columbia National Group, Inc. Neither corporation is publicly held, and no publicly held company owns 10% or more of either corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Columbia Iron & Metal Co. ("CIMCO") respectfully petitions for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit, dated May 15, 2008, is officially reported as In re: Scrap Metal Antitrust Litigation at 527 F.3d 517 and is reproduced at App. A, 1a.

The order of the U.S. Court of Appeals denying rehearing, dated November 19, 2008, is reproduced at App. C, 39a.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit sought to be reviewed was entered on May 15, 2008. This petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rule 13.3 because it is being filed within 90 days of the entry of the order on November 19, 2008 denying rehearing of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND RULE INVOLVED

The relevant statutory provisions involved are Section 1 of the Sherman Act, 15 U.S.C. §1; Section

4(a) of the Clayton Act, 15 U.S.C. §15(a); Section 4B of the Clayton Act, 15 U.S.C. §15b; and Section 5 of the Clayton Act, 15 U.S.C. §16(i), which are reproduced at App. D, 41a- 43a. The relevant rule involved is Federal Rule of Civil Procedure 23, the pertinent portions of which are reproduced at App. E, 44a – 48a.

STATEMENT OF THE CASE

This case arose from a federal grand jury investigation of the scrap metal industry in Northeast Ohio. Several individuals and companies were charged at different times over a period of years with entering into agreements to rig bids for purchases of scrap or to allocate certain scrap generators in violation of Section 1 of the Sherman Act (15 U.S.C. §1). Petitioner was never charged.

After the first criminal charge was publicly announced in early 2000, several scrap generators filed class actions seeking treble damages under Section 4 of the Clayton Act (15 U.S.C. §15). Those cases were consolidated into this class action. On August 15, 2002, petitioner Columbia Iron & Metal Co. ("CIMCO") was added as a new defendant.

A. Class Certification and Notice.

Plaintiffs moved to certify a Civil Rule 23(b)(3) litigation class, and that motion was granted in March 2004. The trial court did not direct that any notice be provided to the class under Civil Rule 23(c), and none was sent at that time.

In May 2004, the trial court preliminarily approved settlements with some other defendants, approved full

and abbreviated forms of settlement notices proposed by class counsel, and directed dissemination of those settlement notices to the absent class members. The notices complied with Civil Rule 23(e) for settlement purposes. Class members were advised of the settlement amounts and claim procedures. They were also informed that "[w]hether or not the settlements ... are approved, the litigation will continue against the non-settling defendants;" that a class member must opt out in order to "pursue any claims against any defendants;" and that, if a class member should opt out, "You will be excluded from the Class Plaintiffs' prosecution of the claims against all defendants ... [and] you may present any claim you may have against ... any other defendant by filing your own lawsuit." However, for class members who did not opt out, there was nothing in either form of notice that "clearly and concisely state[d] in plain, easily understood language ... the binding effect of a class judgment on members under Rule 23(c)(3)" as required by Civil Rule 23(c)(2)(B).

Prior to trial, CIMCO and the other non-settling defendants objected to proceeding with class claims in the absence of the required (c)(2)(B) notice. The trial court denied that motion. At trial, a directed verdict was entered against all class members who sold non-ferrous scrap, representing almost one-half of the sales by the class.

B. Jury Instructions on Limitations Periods.

The jury was instructed on the remaining claims for sales of ferrous scrap. A key issue at trial was the time period during which scrap sales by class members were eligible for damages. Since the complaint was

filed against CIMCO on August 15, 2002, the standard limitations period of four years (15 U.S.C. §15b) exposed CIMCO to damages incurred by class members in transactions from August 15, 1998 to the end of the alleged conspiracy when the first government case was filed in March 2000, a period of 19 months. CIMCO requested an instruction to that effect, but the district court did not permit the jury to apply the basic statute of limitations and, instead, extended the minimum period for damages by an additional 29 months, i.e. beginning in March 1996 rather than August 1998. The court imposed that expansion of CIMCO's exposure with an instruction to the jury, which it described on the record "as a matter of law" (App. F at 49a, emphasis in original):

> In this case, the law imposes a four year limit on the plaintiffs' claim, which limit dates backward from March of 2000. Thus, unless the statute of limitations is tolled or extended for the reasons described in the Court's next instruction [on fraudulent concealment], the plaintiff may only prevail ... in the alleged conspiracy on or after March of 1996, and may only recover damages arising from conduct occurring after that date.

The court based that instruction on the antitrust tolling statute, Section 5 of the Clayton Act (15 U.S.C. §16(i), set forth in App. D at 43a). The court relied on that statute to extend the damages period back four years from March 2000, and not from August 15, 2002 when CIMCO was sued, because the court found that (1) when a government criminal antitrust case had been filed against an alleged co-conspirator in March 2000, (2) that proceeding had suspended the running

of the limitations clock, so that (3) the applicable damages period commenced in March 1996, four years prior to the commencement of the earlier government case.

That statutory tolling instruction was clearly erroneous because Section 5, by its express terms, does not apply to a subsequent private case like this one *unless* the defendant is sued during, or within one year after the conclusion of, the earlier government case. Otherwise, "any action to enforce such [private] cause of action shall be forever barred." The trial court simply overlooked the information on its docket that the March 2000 government case had ended with a plea and sentencing on June 21, 2000, almost 26 months before CIMCO was sued. Moreover, there was no other government proceeding filed during the one year period after the June 2000 conclusion of the March 2000 government case. Therefore, there was no factual basis for the statutory tolling instruction.

The jury was also instructed (a) that it should decide whether fraudulent concealment had been proved so as to extend the damages period back to "the date of the earliest injury" (alleged to be December 1992) and (b) that, if the fraudulent concealment proof failed to convince them, "you are limited to the post-March 1996 time period outlined in the previous [statutory tolling] instruction." Thus, the jury had two choices for the damages period: (1) a minimum of 48 months based solely on statutory tolling or (2) a longer period only if the jury found earlier fraudulent concealment. The jury was given no choice to limit damages to the untolled period of 19 months.

C. Damages Evidence and Verdict.

At trial, plaintiffs' evidence on damages consisted solely of the testimony of their expert. He opined that the cartel suppressed every price paid to ferrous scrap sellers from December 1992 (the beginning of the damages period based on the fraudulent concealment instruction) to the end of the conspiracy in March 2000 by 16.4%. He also testified that, by applying his rate to all ferrous sales for the entire period, class damages amounted to $20.9 million.

The trial court denied defendants' request for special interrogatories and a detailed verdict form. Using the trial court's more limited form, the jury returned a verdict against CIMCO in the aggregate amount of $11.5 million. The verdict form did not request or reveal the time period, the transactions or the class members the jury intended to cover by this aggregate award. Nor did the verdict form indicate the rate of damages used by the jury. The jury could have reached the same aggregate damages award by using either (a) the full 16.4% rate proposed by plaintiffs' expert for the period of 48 months covered by the erroneous statutory tolling instruction or (b) a lower, unknown rate for some longer period of time covered by the fraudulent concealment instruction.

The jury's verdict is fully consistent with a rejection of the fraudulent concealment evidence and reliance exclusively on the trial court's erroneous statutory tolling instruction. If that is what the jury did, CIMCO's liability exposure had been wrongfully increased by 29 months or more than 150 percent. With nothing to distinguish between the statutory tolling and fraudulent concealment concepts on the

verdict form, it was impossible to determine which of the two instructions the jury had followed.

The trial court trebled the verdict amount, credited the prior settlements and entered judgment against CIMCO for the net balance. The possible impact of the legal error on statutory tolling was profound. Even if the jury had accepted the methodology of plaintiffs' expert with no discount, applying those calculations to the proper untolled limitations period would have generated a verdict of $3.031 million. When trebled, that amount would have been less than the prior settlement payments obtained by plaintiffs and, consequently, would have resulted in a judgment for CIMCO.

D. Judgment Entry.

Civil Rule 23(c)(3) required the judgment entry to "specify or describe those to whom the Rule 23(c)(2) notice was directed ... and whom the court finds to be class members." That was impossible for two reasons. First, there had been no Rule 23(c)(2) notice. Second, without a definitive determination of the time period reflected in the verdict, and with no way to identify which of tens of thousands of generator transactions over more than seven years the jury had included in its own calculations, there was also no way to know who ultimately was in the class for whom an aggregate verdict had been returned. The judgment entry (set forth at App. B, 37a), therefore, made no pretense of compliance with Rule 23(c)(3).

E. Appeal.

CIMCO appealed to the U.S. Court of Appeals for the Sixth Circuit. That court held that it was unnecessary to consider the error in the first instruction on statutory tolling of the statute of limitations because "the jury could have reached the verdict based on the fraudulent concealment theory" in the alternative instruction. (App. A at 32a.) The Sixth Circuit also held that the three general statements in the class notice of the partial settlements - - concerning continuation of the litigation and opt out rights - - were sufficient to provide notice of the binding effect of the subsequent directed verdict against a portion of the class and a reduced judgment for another portion. The opinion cited a 1950 case but did not address the specific language of Rule 23(c)(2)(B). (App. A at 30a.) The Sixth Circuit declined a petition for rehearing on the former issue. (App. C at 39a.)

CIMCO petitions this Court for review of the Sixth Circuit's decision on those two holdings.

REASONS FOR GRANTING THE PETITION

This case presents important and common issues arising in treble damages antitrust class actions. These cases are one of the fastest growing categories of litigation in federal courts with filings in 2008 reported to have increased by 27 percent. (ABA AT-Daily Digest, Jan. 14, 2009.)

Most cases of this type follow government proceedings and are brought on behalf of large groups of customers or suppliers who may have been impacted by alleged cartel activity. Classes of this type, which

are seeking damages, are customarily certified, if at all, under Civil Rule 23(b)(3) because of common questions of law or fact. The effect of the prior government cases on the limitations periods for the subsequent private actions, and the proper judicial management of the class action procedure, are critical to the fair resolution of these cases by federal district courts. The prospect for trial court error in complex litigation like this, and the temptation for courts of appeals to accommodate error at the expense of precedent and applicable procedural rules, can easily corrupt a process intended to provide convenience and efficiency to litigants without compromising their due process rights.

This case illustrates antitrust class action problems in two fundamental respects. The first presents jury instructions on different premises for tolling the antitrust statute of limitations. When those instructions lead the jury to different relevant time periods, but one is legally incorrect, it becomes critical on review of the verdict to know whether the jury relied on the incorrect instruction or a correct instruction to set the time parameters for both evidence of a violation and calculation of damages. The second issue, which is inherent in every (b)(3) class action, is the seriousness of the command in Rule 23 that the trial court "must" provide certain information in a notice to the absent members of the class. When a district judge omits any of the specified categories and class members are left to infer the information or never to learn of it, the court has not meaningfully satisfied the Rule's directive that each item listed in Rule 23(c)(2)(B) "must [be] clearly and concisely state[d] in plain, easily understood language." Trial courts and litigants need to confront

these basic elements of ordinary due process in a diligent and objective manner.

This Court has held on multiple occasions that a criminal conviction[1] or civil judgment[2] must be reversed when it cannot be determined whether the jury's verdict was based on an erroneous instruction or an alternative correct instruction. The Court has applied that rule where the correct and incorrect instructions involved different limitations periods,[3] and it has reversed and remanded an antitrust treble damages verdict on that ground.[4] Numerous circuit courts[5] (including the Sixth Circuit until this

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[1] *Stromberg v. California*, 283 U.S. 359, 367-68 (1931)); *Williams v. North Carolina*, 317 U.S. 287, 291-92 (1942); *Cramer v. United States*, 325 U.S. 1, 36 n.45 (1945); *Terminiello v. City of Chicago*, 337 U.S. 1, 5-6 (1949); *Yates v. United States*, 354 U.S. 298, 312 (1957).

[2] *United New York and New Jersey Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613, 619 (1959); *Sunkist Growers, Inc. v. Winkler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962).

[3] *Yates*, *supra* n.1.

[4] *Sunkist*, *supra* n.2.

[5] *See, e.g., Morrissey v. Nat'l Mar. Union of Am.*, 544 F.2d 19, 26-27 (2d Cir. 1976); *Avins v. White*, 627 F.2d 637, 646 (3rd Cir. 1980); *Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187, 1192-93 (4th Cir. 1991), *cert. denied*, 503 U.S. 907 (1992); *Woods v. Sammisa Co.*, 873 F.2d 842, 853-54 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990); *Webber v. Sobba*, 322 F.3d 1032, 1038 (8th Cir. 2003); *McMurray v. Deere and Co.*, 858 F.2d 1436, 1444 (10th Cir. 1988); *Dillard & Sons Const. Inc. v. Burnup & Sims*, 51 F.3d 910, 916 (10th Cir. 1995); *Allen v. Wal-Mart Stores, Inc.*, 241 F.3d 1293, 1298-99 (10th Cir. 2001).

case[6]) have reversed judgments in civil and admiralty cases and remanded for a new trial unless it is virtually certain that an incorrect instruction could not have led to the jury verdict.

In this case, the Sixth Circuit adopted a new standard, *viz.* that the jury verdict must be affirmed so long as the jury "could have" relied on a correct instruction instead of the erroneous one. This standard not only conflicts with the principle set forth in this Court's precedents and the holdings of other circuit courts, but it undermines litigants' assurance of due process by allowing juries to rely upon incorrect instructions on the applicable law.

This Court has also mandated the best notice practicable for a certified Rule 23(b)(3) class. Rule 23(c)(2)(B) was amended to eliminate any excuse for a confusing or inadequate implementation of that obligation. The Rule explicitly states that it is the duty of the trial court to "direct to class members the best notice" and then is unequivocal in its requirement that the notice has to provide certain specified information in terms understandable to laymen, not just by implication to lawyers: "the notice must clearly and concisely state in plain, easily understood language" the express information set forth in seven categories. Those seven categories were separated as bullet points (now listed as subparagraphs i-vii) by the 2003 amendments to the Civil Rules (before class

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[6] *Kosters v. The Seven-Up Co.*, 595 F.2d 347, 355 (6th Cir. 1979); *West Knoxville Assocs. Ltd. P'ship v. Ticor Title Ins. Co.*, 1997 U.S. App. LEXIS 23942 at *28-29 (6th Cir. 1997); *cf. Herrington v. Edwards*, 1999 U.S. App. LEXIS 1220 at *19-20 (6th Cir.), *cert. denied*, 527 U.S. 1049 (1999) (criminal).

certification in this case) to make it obvious that each is essential. The last category is the most important to assure due process: according to the Rule, a class member "must" be told "the binding effect of a class judgment."

This Court has had no occasion since the promulgation of Rule 23(c)(2)(B) to encounter a lower court that has simply ignored that mandated element of adequate notice and deliberately proceeded to trial, notwithstanding having been alerted to its omission. Left uncorrected, this sort of noncompliance can be repeated, thereby undermining the series of progressively more demanding amendments to Rule 23 designed to assure due process

Civil Rule 23(c)(3) was also amended to reinforce the requirement of a specific notice and to link that notice to the ultimate judgment: "whether or not favorable to the class, the judgment in a class action must ... for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members." This Court has never confronted a (b)(3) class action judgment where that obligation was completely circumvented, as it was in this case.

This Court should grant certiorari (a) to address the application of its prior decisions to civil cases, and the conflict between the circuits, where there is verdict ambiguity between correct and erroneous jury instructions, as well as (b) to require trial courts to adhere to this Court's class action rule.

I. THE SIXTH CIRCUIT'S NEW STANDARD FOR AFFIRMING AN AMBIGUOUS JURY VERDICT DEPARTS FROM ITS OWN PRIOR STANDARD, CONFLICTS WITH THE STANDARD ADOPTED IN OTHER CIRCUITS AND CONTRADICTS THE DECISIONS OF THIS COURT.

While speculating that the jury "could have" relied on a fraudulent concealment instruction to reach its verdict, the Sixth Circuit was unable to deny that the jury also "could have" relied exclusively on the erroneous statutory tolling instruction to establish the relevant time period for both a Sherman Act violation and class damages.

The former assumption was based on a pure guess that the jury (a) may have considered evidence of activities eight or nine years prior to the lawsuit for violation purposes and (b) may have arbitrarily reduced the rate of damages proffered by plaintiffs' expert and substituted a lower rate of damages for transactions from December 1992 to March 2000 (the longer period if the fraudulent concealment instruction was followed).

Nonetheless, the jury's verdict was equally consistent - - indeed, more consistent - - with plaintiffs' argument of more recent wrongful acts in 1996 and application of the expert's full rate of damages just to transactions from March 1996 to March 2000 (the erroneous statutory tolling period). That possibility would mean that the jury had rejected fraudulent concealment as a matter of fact and had followed only the erroneous statutory tolling instruction. There is

nothing in the record to resolve that inherent uncertainty.

A. The Sixth Circuit's New Standard, that a Verdict Can Stand Where the Jury Was Instructed on Alternate Theories and May Have Followed Either a Correct or an Erroneous Instruction, Will Permit Juries to Rely upon Clear Errors of Law.

In *Yates v. United States*, 354 U.S. 298, 312 (1957), this Court reaffirmed the requirement of reversal, which it had established in a series of state and federal criminal cases (n. 1, *supra*), where it cannot clearly be determined whether the jury verdict was based on a correct or an incorrect instruction of the law:

> In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.

The Sixth Circuit in this case effectively reversed the impact of this rule by holding that the mere possibility that an acceptable instruction "could have" led to a verdict is sufficient to affirm. In so holding, the Sixth Circuit not only deviated from the proper rule enunciated by this Court and applied by other circuit courts in civil cases, it also set aside its own prior jurisprudence on this issue.

The distinction between harmless and reversible error in the face of dueling instructions always had turned on whether the jury's verdict "necessarily

demonstrates" that a "valid ground," and not a legally incorrect one, was the basis for the jury's decision. *See* discussion in *United States v. Palazzolo*, 71 F.3d 1233, 1235-37 (6th Cir. 1995). The Sixth Circuit had acknowledged in its prior decisions that a "view of probabilities concerning the jury's reasoning" should not sustain a verdict; there must be "a conclusive showing from the record that the jury 'necessarily' based its verdict on" a proper instruction of the law. *Id.*; *cf. United States v. Rayborn*, 491 F.3d 513 (6th Cir. 2007), *cert. denied*, 128 S.Ct. 1327 (2008) (jury verdict affirmed where the jury "must have" followed a proper instruction). If the Sixth Circuit had adhered to its prior view, the virtual certainty test it had been following would have required a reversal in this case (*Palazzolo*, 71 F.3d. at 1238):

> In the present case, the court gave an instruction that was legally incorrect. The jury had no way of determining that the instruction misstated the law .... [T]he possibility of error consisted of the jury following an erroneous instruction of the law .... Indeed, we must assume that the verdict lends itself at least to the possibility that the jury found the defendants guilty ... under an [erroneous] instruction....

Instead of adhering to that principle, the Sixth Circuit has now embraced the sufficiency of a mere possibility that the jury ignored the erroneous instruction.

Other circuits have faithfully followed this Court's rule in civil cases (n. 3, *supra*). This case marks a dramatic departure from the "must have," "necessarily demonstrates," "conclusive showing" and "absolute

certainty" criteria previously required to sustain an ambiguous general verdict by adopting the very different standard that a verdict will be affirmed merely because the jury "could have" ignored an incorrect instruction and, instead, applied another. The Sixth Circuit has substituted a possibility test for a certainty test, thereby expanding the class of cases that will be immune from reversal and a new trial, notwithstanding a jury's acceptance of a clear error of law.

The concept that a court can (1) provide a jury multiple ways to arrive at a verdict, (2) give jurors correct law on just one of those ways, (3) not be able to determine whether they followed the correct or the incorrect law and (4) accept the verdict because it is merely possible that the jury itself "could have" ignored every erroneous instruction, constitutes a license for trial courts to be casual - - even reckless - - in their instructions so long as at least one alternative is accurate. Verdicts that are in fact the consequence of a jury accepting a clear error of law will routinely be exempt from reversal.

That approach, if tolerated by this Court, will motivate parties to seek erroneous and prejudicial alternative instructions, then argue them to the jury, with the comfort that there is much to gain and nothing to lose. Successful overreaching can generate an enormous benefit without making a verdict induced by procured error vulnerable on appeal. That is what happened in this case with plaintiffs successfully arguing for, in fact inducing, the erroneous statutory tolling instruction.

A change this antithetical to prevailing law, the traditional review of jury verdicts and fundamental requirements of due process should not be tolerated. Once the gate is opened for this kind of gamesmanship at the trial level, there is no systemic discipline because there is no risk of a negative consequence for leading the trial court astray, and fatal legal errors are likely to recur with some frequency.

B. The Sixth Circuit's Standard Will Allow Reviewing Courts to Affirm Verdicts without Examining the Errors upon which the Verdicts May Be Based.

The disposition below demonstrates the consequence of the Sixth Circuit's new approach. This Court's rule, and that of other circuits, has mandated an examination of alternative instructions and reversal of an ambiguous verdict where any of the relevant instructions was legally incorrect. Under the Sixth Circuit approach, a reviewing court can, and presumably will, eschew a concern for errors and, instead, pursue a search for any alternate correct instruction on which the jury might have relied. Having found at least one route to a verdict that would have been lawful, the court of appeals would then not need to consider whether any of the other possible routes actually used by the jury would have caused the jury to base its decision on legal error.

That is precisely what happened in this case. The Sixth Circuit first concluded that the jury "could have" reached its verdict by applying the fraudulent concealment instruction. Then the court declined to address the statutory tolling instruction on the principle that it had become superfluous: "Because we

conclude that the jury could have reached the verdict based on the fraudulent concealment theory, we do not reach [CIMCO's] objection to the statutory tolling instruction." (App. A at 32a.)

That approach to judicial review has abandoned the rule announced by this Court, followed by the other circuits, and previously endorsed by the Sixth Circuit itself. Having found one unpoisoned piece of fruit in a basket, the Sixth Circuit eschews any concern whether the victim actually ate a different and fatal piece.

II. THE SIXTH CIRCUIT HAS ELIMINATED THE REQUIREMENT OF CIVIL RULE 23(c)(2)(B) FOR NOTICE TO A CERTIFIED RULE 23(b)(3) CLASS OF THE BINDING EFFECT OF A CLASS JUDGMENT.

For decades, Rule 23(c) has required an explicit notice to a Rule 23(b)(3) trial class of the binding effect of a judgment on the absent members of the class. "At least where a claim for legal relief in the form of monetary damages is at stake, each class member's interest in litigation is presumptively sufficient to constitute a property interest for purposes of the Due Process Clause." ABA Section of Litigation, Business and Commercial Litigation in Federal Courts (2d ed. 2005), §16:29 at 348. "[T]he notice requirements of Rule 23(c)(2) for 23(b)(3) class actions are mandatory and may not be waived at the discretion of the district court." *Id.*, §16:38 at 367.

The seven essential components for sufficient notice to a Rule 23(b)(3) class were separated as bullet points in the 2003 version of Rule 23(c) to make them even more obvious. The Manual for Complex Litigation,

Fourth (§1.311) makes the point unequivocally that none of them is optional. This Court explained in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (omission in original) that "The Advisory Committee described (c)(2) as 'not merely discretionary' and added that the 'mandatory notice pursuant to subdivision (c)(2) ...is designed to fulfill requirements of due process to which the class action procedure is of course subject.'"

The class notice is intended to protect both the absent class members and the defendant. The former are entitled to know that, if they entrust their claim to the counsel who has volunteered to represent them, they will be obliged to accept whatever result he may achieve. The defendant is entitled to protection from second-guessing by a disgruntled class member who may otherwise believe he can sit on the sideline and choose to opt in to take advantage of only a desirable outcome. Courts have described this problem as "sideline sitting." *See, e.g., Robinson v. Union Carbide Corp.*, 544 F.2d 1258, 1262 (5th Cir. 1977).

By its decision in this case, the Sixth Circuit now permits general language in a notice of partial settlements under Rule 23(e) - - concerning opt out rights and the fact that litigation will continue against non-settling defendants - - to replace a Rule 23(c)(2)(B) notice with no reference whatsoever to the binding effect on class members of any later judgment for or against the non-settling defendants. While someone legally trained may infer that this would be the ultimate consequence of ongoing litigation, a class notice is directed to laymen with little or no familiarity with legal procedure.

When a layman is told that "the litigation will continue," that he must opt out to "pursue any claims against any defendants," including the settling defendants, and that, if he opts out, he "will be excluded" from the class and may "present any claim ... by filing your own lawsuit," he does not necessarily understand that he will have no later opportunity to avoid or challenge a result with which he disagrees. That is why Rule 23(c)(2)(B) obligates the trial court to make that clear. The Sixth Circuit has seriously eroded that requirement by endorsing notice language that cannot be said to meet the requirement of Rule 23(c)(2)(B) for clear, concise, plain and easily understood language explaining that point.

Since settlements with fewer than all defendants are common in antitrust conspiracy cases, and plaintiffs' counsel are often inclined to seek approval of those settlements to facilitate interim distributions of the proceeds and payment of fees before a trial against the remaining defendants, this form of inadequate notice, if tolerated, can easily proliferate.

III. THE SIXTH CIRCUIT PERMITS A FINAL JUDGMENT THAT DOES NOT CONFORM TO CIVIL RULE 23(c)(3).

When the trial court consciously proceeded to a final judgment without satisfying the notice requirement, clarifying the verdict or amending the class certification order, the court deliberately ignored both the language of Rule 23(c)(1)(C) and Justice Douglas' observation in *Eisen, supra*, 417 U.S. at 184, that "[i]t is as plain as words can make it that the court which decides that a full class action can be

maintained can alter or amend its order 'before the decision on the merits.'"

Rule 23(c)(3) performs two important functions. First, it demands clarity in a class action judgment for purposes of identifying those to whom it applies and to facilitate enforcement. Second, it imposes self-discipline on the trial court by forcing a reconciliation between the formal disposition of the case and the process by which the case reached its conclusion. Thus, for a (b)(3) class, Rule 23(c)(3) requires a link to the specific form of notice mandated by Rule 23(c)(2)(B), and it also requires a link to the verdict to establish those persons covered by the jury's decision.

When it entered its judgment (set forth at App. B, 37a-38a), the court was incapable of complying with the explicit requirements of Rule 23(c)(3). Since no (c)(2) notice had ever been directed to anyone, the court was unable to satisfy the provision that "the judgment in a class action must...specify or describe those to whom the Rule 23(c)(2) notice was directed." The judgment did not even identify those receiving the Rule 23(e) settlement notice. Since there was no way to determine which generators of ferrous scrap had been included by the jury - - those selling from 1992 to 2000 or only those selling from 1996 to 2000, the court was unable to satisfy the provision that "the judgment in a class action must ... specify or describe those ... whom the court finds to be class members."

Having accommodated the trial court's notice deficiency, and having concluded that the inherent ambiguity in the transactions and class members the jury intended to include in its aggregate verdict was also acceptable, the Sixth Circuit chose to ignore the

derivative defects in the judgment entry without comment.

The form of judgment adopted by the trial court and its acceptance by the Sixth Circuit effectively nullified Rule 23(c)(3). This approach will eliminate the discipline imposed by the Rule to assure that the disposition of a class action accurately reflects satisfaction of the necessary procedural and due process prerequisites.

CONCLUSION

The petition should be granted and a writ of certiorari issued to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-4511

[Decided and Filed: May 15, 2008]

In re: SCRAP METAL ANTITRUST LITIGATION

Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 02-00844—Kathleen McDonald O'Malley, District Judge.

Argued: October 30, 2007

Before: BATCHELDER, COLE, and SUTTON, Circuit Judges.

OPINION

R. GUY COLE, JR., Circuit Judge. Defendant-Appellant Columbia Iron and Metal Company ("Columbia") appeals a jury verdict finding Columbia liable for antitrust violations and awarding the Plaintiffs-Appellees damages exceeding $20 million. The most critical question on appeal relates to the damages testimony of Plaintiffs-Appellees' expert, Dr. Jeffrey Leitzinger. Columbia asserts that Leitzinger's

damages calculations are unreliable, and that the district court therefore erred in admitting his testimony. Columbia also raises three additional arguments on appeal: (1) the damages award is not supported by sufficient evidence and represents an impermissible "fluid recovery"; (2) the district court improperly allowed the case to proceed as a class action; and (3) the district court improperly instructed the jury on the tolling of the statute of limitations. Finding no reversible error by the district court, we **AFFIRM** the verdict and damages award.

I. BACKGROUND

Plaintiffs-Appellees Lincoln Electric Company and Profile Grinding, Inc. filed suit in 2002 on behalf of themselves and a class of industrial scrap-generating companies in Northeastern Ohio (collectively, "Plaintiffs") against, inter alia, Defendant-Appellant Columbia; Columbia National Group (Columbia's parent company); Harry Rock & Associates; M. Weingold & Co., Inc.; DeMilta Iron and Metal; Bay Metal, Inc.; Bluestar Metal Recycling, Inc.; and Parkwood Iron and Metal, Inc. (collectively, "Defendants"). Plaintiffs generate scrap metal, both ferrous (iron-based) and nonferrous, as a byproduct of their manufacturing. Plaintiffs sell the unprocessed scrap metal to brokers and dealers, such as Defendants, who then haul, clean, sort, and process the scrap before selling it to end users, such as steel mills. The movement of unprocessed scrap from generators to dealers generally works as follows: The dealers submit bids to the generators for the purchase of unprocessed scrap during a specified time period at a set price. In setting their bid price, dealers consult various trade publications, which report the prevailing

prices that dealers can expect to charge users for the scrap after they have processed it. To ensure that they turn a profit, dealers set their bid price for the unprocessed scrap below the amount they will ultimately charge the users for the processed scrap. If the bid is accepted by the scrap generator, the generator and the dealer enter into a contract at the bid price for the bid period.

In this case, Plaintiffs allege that Defendants violated § 1 of the Sherman Act, 15 U.S.C. § 1, by conspiring to restrain and eliminate competition in the purchase of unprocessed industrial scrap metal in Northeastern Ohio. Specifically, Plaintiffs claim that Defendants engaged in a variety of unlawful acts including allocating scrap metal generators among dealers, agreeing not to compete with one another, submitting rigged bids, setting prices for the purchase of unprocessed scrap metal, and imposing financial penalties on co-conspirators for disobeying allocation agreements.

On May 30, 2003, Plaintiffs moved to certify a class consisting of all generators who sold scrap metal to Defendants and/or their co-conspirators between December 1992 and March 2000. The district court certified the class in March 2004.

Prior to trial, Plaintiffs settled with or dismissed all but three Defendants. In 2005, the remaining Defendants, including Columbia, filed a motion to preclude damages testimony from Plaintiffs' expert economist, Dr. Jeffrey Leitzinger. The district court denied the motion, finding that Defendants' arguments relating to Leitzinger's damages analysis went to the weight, not the admissibility, of his testimony.

Defendants then moved for summary judgment, which the district court also denied. Three days before trial, Columbia moved to decertify the class, claiming that it had just discovered that the class notice was inadequate. The district court denied Columbia's motion, and the three remaining Defendants, including Columbia, proceeded to trial.

At the conclusion of the trial, the court directed a verdict against Plaintiffs for all claims relating to non-ferrous scrap-metal sales on the ground that Plaintiffs failed to establish any proof of injury or damages relating to such transactions. As for the remaining claims, those relating to ferrous scrap-metal sales, the jury returned a verdict against Columbia only and awarded Plaintiffs $11.5 million in damages. The district court, pursuant to 15 U.S.C. § 15(a), tripled the jury's award to $34.5 million, subtracted the amount received from the settling Defendants, and thereupon entered a judgment against Columbia in the amount of $23,036,000.

Columbia moved for judgment as a matter of law and, alternatively, for a new trial or a reduction of the damages. The district court denied both motions, and Columbia timely appealed.

II. ANALYSIS

Columbia presents four issues on appeal. First, Columbia claims that the district court erred in denying its motion to exclude Leitzinger's testimony. Second, Columbia asserts that the evidence was insufficient to support the damages award and that the award represents an impermissible "fluid recovery." Third, Columbia argues that the district

court did not comply with Federal Rule of Civil Procedure 23 in certifying a class and allowing the case to proceed as a class action. Finally, Columbia challenges the district court's instructions to the jury on the tolling of the statute of limitations. We address each of these arguments in turn.

A. Admissibility of Leitzinger's Testimony

1. Leitzinger's Calculations

We begin by summarizing Leitzinger's testimony, which Plaintiffs offered to prove the amount of damages the class incurred as a result of Defendants' anticompetitive conduct. Leitzinger employed what is referred to interchangeably as the "during and after" or "before and after" method to determine the amount Defendants underpaid Plaintiffs for unprocessed scrap metal. Employing this method, the profits made by antitrust defendants *during* the alleged conspiracy are compared with the profits made by the defendants in the period *after* the alleged conspiracy. In simple terms, by analyzing this difference, an expert can determine the amount of profit during the conspiracy period had the antitrust violation not occurred. Presumably, the data would show that, but for the anticompetitive conduct, the defendants' profit margin would have been lower and the plaintiffs' profit margin would have been higher.

Here, Leitzinger calculated the difference, both during and after the alleged conspiracy, between (1) the generator-dealer transactions, i.e., the amount the dealers paid to the generators for unprocessed scrap metal, and (2) the dealer-user transactions, i.e., the amount for which the dealers sold processed scrap

metal to users. Leitzinger used actual transaction data from a sample of generators and dealers for the generator-dealer transactions. However, in order to control for factors other than the conspiracy that might have affected prices, Leitzinger used index prices for the dealer-user transactions, which were published on a weekly basis in American Metal Market ("AMM") and *Iron Age* magazine's Scrap Price Bulletin ("SPB"). These index prices represented the prevailing prices users paid dealers for processed scrap. Leitzinger testified that Defendants also used these published prices to determine the amount they would bid on the generators' unprocessed scrap. The "price spread"—the difference between (1) the price a dealer paid to a generator for unprocessed scrap, and (2) the comparative figure from a price index, representing the amount the dealer earned from selling the processed scrap to a user—was the dealer's profit. By comparing the price spread during the conspiracy period with the price spread after the conspiracy period, Leitzinger concluded that the results were consistent with anticompetitive conduct: Defendants' profits declined after the conspiracy, while the generators' profits rose.

Leitzinger used the SPB index to analyze only the ferrous scrap-metal market. He concluded that, on average, there had been a 16.4 percent undercharge on the purchase of unprocessed ferrous scrap metal during the conspiracy period. Put another way, Leitzinger concluded that Defendants would have paid Plaintiffs 16.4 percent more for unprocessed ferrous scrap metal in the absence of an antitrust conspiracy. Because Defendants' total purchases of ferrous scrap metal from the class members during the class period amounted to $127.6 million, Leitzinger calculated

damages at $20.9 million ($127.6 million times 16.4 percent).

As to the non-ferrous scrap-metal market, Leitzinger used the AMM index to make his calculations, rather than the SPB index, because market participants regularly used the AMM index to price non-ferrous scrap. Leitzinger was unable to identify any undercharge affecting dealers' purchase of non-ferrous scrap, which he attributed to his inability to assemble "enough data of the right quality to be able to really and truly see what had happened on the nonferrous side."

2. Scrap Price Bulletin

Columbia objects to Leitzinger's use of the SPB index to ascertain the pricing of dealer-user ferrous scrap-metal sales. Although evidence at trial showed that the SPB index was commonly used by dealers as a benchmark for pricing processed ferrous scrap, Columbia argues that this index is not a reliable source for damages calculations because on December 7, 1998 and October 4, 1999, *Iron Age* issued a correction to the SPB, stating that thirteen of the eighteen categories of processed ferrous scrap had been reported incorrectly for an unknown period of time. At his deposition, Leitzinger explained that this adjustment was merely a result of the magazine's "change in [its] method of reporting prices." Leitzinger said that *Iron Age* decided to switch from reporting prices "FOB dealer to FOB user," thereby adding additional costs like transportation and broker fees to

the reported prices.[1] To "account for the *Iron Age* reporting method change" and "to measure the value that generators received relative to a consistent processed scrap price," Leitzinger "backed out" the December 1998 and October 1999 "corrections" by subtracting them from the SPB index prices.

Following Leitzinger's deposition, Columbia submitted the affidavit of John Ambrosia, an *Iron Age* reporter, who explained that the magazine adjusted the SPB prices because, for some unexplained reason, they failed to reflect actual transaction prices for the Northeastern Ohio area. The corrections were therefore necessary to ensure that the SPB index accurately reported market prices. Ambrosia stated that the adjustments had nothing to do with a change in pricing measuring points, e.g., "FOB dealer to FOB user," as Leitzinger believed. Moreover, Ambrosia said that he did not know when the ferrous scrap prices had begun to depart from actual market prices.

Columbia asserts that because Leitzinger assumed that the increases in the SPB index simply reflected a change in the price measuring point, he mistakenly concluded that he could create a "consistent processed-ferrous-scrap-price data set" by "backing out" the amount of the SPB increases. Plaintiffs concede that Leitzinger's assumption that *Iron Age* simply changed reporting methods was incorrect and that the SPB

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[1] "FOB," meaning "free on board" is a delivery term which indicates what transportation costs and risks the dealer must assume. "FOB dealer" means that the dealer is responsible for getting the goods to a common carrier; "FOB user" means that the dealer is responsible for getting the goods to the user. 18 Richard A. Lord, Williston on Contracts § 52:11 (4th ed. 2007).

corrections were necessary to accurately report market prices for processed ferrous scrap. Columbia thus argues that Leitzinger's analysis is fatally flawed for two reasons: First, as the argument goes, Leitzinger did not have a reliable data set to work with prior to December 7, 1998, when the SPB index was brought back into alignment with actual market prices. Second, by "backing out" the corrections, Leitzinger made the SPB data with which he was working inaccurate.

Columbia compares Leitzinger's conclusion that there was a 16.4 percent undercharge during the conspiracy with his inability to identify any measurable damages in connection with non-ferrous scrap sales. Columbia argues that this inconsistency makes no sense because the same scrap dealers were purchasing both ferrous and non-ferrous scrap during the conspiracy, usually from the same generators. It is therefore reasonable to expect that if there was an undercharge for the sale of ferrous scrap, there similarly would have been an undercharge for the sale of non-ferrous scrap. Columbia argues that there is an obvious culprit behind this discrepancy: Whereas Leitzinger used the inaccurate SPB price index in calculating the ferrous-scrap undercharge (and then made that data even more inaccurate by subtracting out the 1998 and 1999 adjustments), he used the AMM price index in analyzing the non-ferrous scrap market. Columbia points out that, unlike the SPB index, the AMM required no "corrections" to ensure that it accurately reflected actual market prices. Further, at trial, Columbia's expert testified that when he substituted the AMM data into Leitzinger's ferrous analysis, "most of the apparent damages disappeared." Plaintiffs counter Columbia's argument in several ways. First, Plaintiffs claim that Leitzinger's decision

to rely on the SPB index for ferrous transactions and on the AMM index for non-ferrous transactions was proper because that is exactly what the relevant industry actors did. Testimony at trial established that industry participants used the SPB to price ferrous scrap and the AMM to price non-ferrous scrap. Second, and relatedly, Plaintiffs argue that regardless of whether the SPB numbers were accurate, because the industry participants referred to those numbers for their pricing decisions, it was entirely appropriate for Leitzinger to rely on them to calculate Plaintiffs' damages in connection with their ferrous scrap sales. Third, Plaintiffs argue that Leitzinger made the right call when he "backed out" the SPB adjustments because the dealers themselves did the same thing. In other words, the dealers did not increase their bid price to the generators based on the new SPB numbers, but instead held firm to the old numbers. Thus, according to Plaintiffs, even though Leitzinger got the reason for the SPB adjustments wrong, all that matters is that he treated the adjustments just as the industry participants did—by backing them out of the SPB prices. Stated otherwise, Plaintiffs claim that Leitzinger relied on the SPB index to account for market changes, and when the SPB index adjusted, he, *just like Defendants*, backed out the adjustments. Finally, Plaintiffs assert that Columbia's argument founders on the testimony of its own expert, who stated at trial that as long as the SPB index moved "roughly parallel" to actual prices of processed ferrous scrap, inaccuracies in the index were not material. Indeed, Plaintiffs displayed a graph at trial showing "roughly parallel" lines representing actual sales prices for processed ferrous scrap and the SPB indices.

3. The District Court's Ruling

The district court denied Columbia's motion to preclude Leitzinger's testimony. The court explained that it had

> spent a substantial amount of time and effort reviewing the parties' voluminous filings relative to the admissibility—or inadmissibility—of Dr. Leitzinger's testimony pursuant to the applicable standards set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Despite [Columbia's] many well-supported attacks on the underlying data employed and assumptions made by Dr. Leitzinger in reaching his assumed damage calculation, the Court finds that those attacks are best reserved for cross-examination and do not, in this case, rise to the level warranting exclusion under *Daubert*.

(JA 799-800.) The court went on to state that there was "substantial room for debate" about Leitzinger's data set and "substantial bases upon which to criticize" certain of his assumptions. Nonetheless, the court concluded that

> Dr. Leitzinger has provided reasoned explanations for the assumptions that he made and has, at least at [this] stage, presented viable arguments to support his data set choices. Whether those explanations will withstand rigorous cross-examination, or challenges based on alternative assumptions or data choices, is not the issue now before the Court. The Court concludes that Dr. Leitzinger's

> opinions satisfy the *Daubert* standard and that [Columbia's] criticisms of those opinions simply are appropriate fodder for cross-examination.

(*Id.*)

In response to the two post-trial motions filed by Columbia, a motion for judgment as a matter of law and a motion for a new trial, the district court made

> one final observation regarding the nature and strength of Leitzinger's testimony. As noted, the Court spent a substantial period of time analyzing, and re-analyzing, the Defendants' *Daubert* motions seeking to exclude Leitzinger's testimony in its entirety. The Court felt that Defendants' challenges were substantial and written attacks on his testimony articulately stated. It was only after several passes through the motion papers that the Court was able to understand that those challenges, though pointed, went to the weight and not the admissibility of Leitzinger's opinions- i.e., did not justify the wholesale exclusion of testimony Defendants sought.
>
> The Court finds it notable that, after hearing Leitzinger's testimony in open court, hearing his responses to counsel's pointed attacks on cross-examination, and hearing what ultimately proved to be only limited critiques of Leitzinger's analysis by [Defendants' expert], the Court was more convinced than it had been when it made its initial *Daubert* ruling that its ruling was correct. . . . Ultimately, the debate

> over Leitzinger's testimony was left where it should have remained-with the jury.

In re Scrap Metal Antitrust Litigation, No. 1:02CV0844, 2006 WL 2850453, at *18 (N.D. Ohio Sept. 30, 2006).

4. Standard of Review

We review for abuse of discretion the district court's determination to admit or exclude expert testimony, "recognizing, of course, that such review calls for deference to the district court's decision." *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 781 (6th Cir. 2002) (citing *Clay v. Ford Motor Co.*, 215 F.3d 663, 666 (6th Cir. 2000)). Such deference applies to the way in which the court assesses admissibility as well as the court's ultimate decision of admissibility. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152-53 (1999). Thus, we will not substitute our own judgment for that of the district court and will reverse an evidentiary decision "only where we are left with a definite and firm conviction that [the district court] committed a clear error of judgment." *Conwood*, 290 F.3d at 781 (citing *Singleton v. United States*, 277 F.3d 864, 870 (6th Cir. 2002); *Trepel v. Roadway Express, Inc.*, 194 F.3d 708, 716 (6th Cir.1999)).

5. Discussion

The starting point in our analysis is Federal Rule of Evidence 702, which governs the use of expert testimony. Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to

> understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

This rule, as amended in 2000, reflects the Supreme Court's decisions in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and *Kumho*. Fed. R. Evid. 702 advisory committee's notes, 2000 amend. ("In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science.").

Parsing the language of the Rule, it is evident that a proposed expert's opinion is admissible, at the discretion of the trial court, if the opinion satisfies three requirements. First, the witness must be qualified by "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Second, the testimony must be relevant, meaning that it "will assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* Third, the testimony must be reliable. *Id.* Rule 702 guides the trial court by providing general standards to assess reliability: whether the testimony is based upon "sufficient facts or data," whether the testimony is the "product of reliable principles and methods," and whether the expert "has applied the principles and methods

reliably to the facts of the case." *Id.* In addition, *Daubert* provided a non-exclusive checklist for trial courts to consult in evaluating the reliability of expert testimony. These factors include: "testing, peer review, publication, error rates, the existence and maintenance of standards controlling the technique's operation, and general acceptance in the relevant scientific community." *United States v. Langan*, 263 F.3d 613, 621 (6th Cir. 2001) (citing *Daubert*, 509 U.S. at 593-94). The test of reliability is "flexible," and the *Daubert* factors do not constitute a "definitive checklist or test," but may be tailored to the facts of a particular case. *Kumho*, 526 U.S. at 150 (citing *Daubert*, 509 U.S. at 593). Indeed, we have recognized that the *Daubert* factors "are not dispositive in every case" and should be applied only "where they are reasonable measures of the reliability of expert testimony." *Grossv. Comm'r*, 272 F.3d 333, 339 (6th Cir. 2001).

On appeal, Columbia does not argue that Leitzinger was unqualified as an expert or that his testimony was irrelevant. Nor does Columbia challenge generally the reliability of the "during and after" method to determine damages; indeed, this method is broadly accepted for proving antitrust damages. *See Conwood*, 290 F.3d at 793 n.8 (explaining that "[t]he before and after theory compares the plaintiff's profit record prior to the violation with that subsequent to it" and finding such method accepted in antitrust cases) (internal quotation and citation omitted). Columbia's argument, rather, is limited to challenging the reliability of Leitzinger's testimony specifically because of his use of the inaccurate SPB price index and his alterations to the SPB's prices. Columbia contends that Leitzinger used erroneous data and necessarily produced an erroneous conclusion; in sum, "garbage in, garbage

out." Columbia argues that the district court should have, therefore, excluded Leitzinger's proposed testimony as insufficiently reliable under Rule 702.

Columbia's argument is unpersuasive because it fundamentally confuses the *credibility and accuracy* of Leitzinger's opinion with its *reliability*. Contrary to Columbia's assertions, a determination that proffered expert testimony is reliable does not indicate, in any way, the correctness or truthfulness of such an opinion. Indeed, although "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert," *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997), a court must be sure not "to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other." Fed. R. Evid. 702 advisory committee's note, 2000 amend. Instead, the requirement that an expert's testimony be reliable means that it must be "supported by appropriate validation—i.e., 'good grounds,' based on what is known." *Daubert*, 509 U.S. at 590. The task for the district court in deciding whether an expert's opinion is reliable is not to determine whether it is correct, but rather to determine whether it rests upon a reliable foundation, as opposed to, say, unsupported speculation. *See* Fed. R. Evid. 702 (explaining that expert testimony must be based on "sufficient facts or data" and the "product of reliable principles and methods"); *Conwood*, 290 F.3d at 792 (stating that the district court must determine whether proffered expert testimony "rests on a reliable foundation") (internal quotation and citation omitted).

An analogous case is illustrative. In *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1343-44 (11th Cir. 2003), the appellant challenged the admission of the appellee's expert testimony relating to computational fluid dynamics ("CFD"). The appellant focused on the specific application of the CFD method, not on the reliability of the CFD method in general. Specifically, the appellant argued that the expert used incorrect data or was missing data to run the CFD study and used the wrong equations to run the analysis. *Id.* at 1344. If the data used was incorrect, the appellant argued, the conclusions necessarily were flawed as well and should be excluded from the jury. *Id.* at 1344-45. The Eleventh Circuit, however, held that such an attack goes to the weight of the evidence, rather than to its admissibility:

> [The appellant] does not argue that it is improper to conduct a CFD study using the sorts of aerodynamic data that [the appellee] employed, but rather that the specific numbers that [the appellee] used were wrong. Thus, the alleged flaws in [the appellee's] analysis are of a character that impugn the *accuracy* of his results, not the general scientific *validity* of his methods.
>
> The identification of such flaws in generally reliable scientific evidence is precisely the role of cross-examination.

Id. at 1345 (emphasis added).

That is not to say that a significant error in application will never go to the admissibility, as opposed to the weight, of the evidence. Indeed, the

2000 amendments to Rule 702 explain that an expert witness must "appl[y] the principles and methods reliably to the facts of the case." Fed. R. Evid. 702(3); *see also* Fed. R. Evid. 702 advisory committee's note, 2000 amend. ("[A]*ny* step that renders the analysis unreliable . . . renders the expert's testimony inadmissible.") (internal quotation marks omitted). But "rejection of expert testimony is the exception, rather than the rule," *id.*, and we will generally permit testimony based on allegedly erroneous facts when there is some support for those facts in the record.

For example, in *Jahn v. Equine Services*, 233 F.3d 382 (6th Cir. 2000), this Court reversed a district judge's decision holding inadmissible proposed expert testimony, and remanded for a hearing. The Court explained that although the opinions of the proffered testimony "may very well be 'shaky,'" because the opinions were based upon facts in the record, and were not "assumptions" or "guesses," challenges merely went to the accuracy of the conclusions, not to the reliability of the testimony. *Id.* at 390-93. *See also McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 801 (6th Cir. 2000) ("An expert's opinion, where based on assumed facts, must find some support for those assumptions in the record. However, mere 'weaknesses in the factual basis of an expert witness' opinion . . . bear on the weight of the evidence rather than on its admissibility.' (quoting *United States v. L.E. Cooke Co.*, 991 F.2d 336, 342 (6th Cir.1993)) (internal citations omitted)); *Cooke*, 991 F.2d at 342 ("Where an expert's testimony amounts to 'mere guess or speculation,' the court should exclude his testimony, but where the opinion has a reasonable factual basis, it should not be excluded. Rather, it is up to opposing counsel to inquire into the expert's factual basis.")

Here, Columbia takes issue with the factual basis of Leitzinger's testimony, specifically his use of the SPB data, his understanding of what the December 1998 and October 1999 adjustments meant, and his reasons for backing out those adjustments. But Columbia does not argue that Leitzinger's opinion is entirely unsupported, that he merely pulled the numbers comprising his calculations out of thin air. Insofar as Columbia claims that Leitzinger should not have used the SPB index at all, that argument fails in light of the uncontroverted testimony at trial establishing that the industry participants used the SPB index to fix prices for ferrous scrap.

Next, we agree with the district court that Leitzinger's "backing out" of the SPB adjustments did not render his expert opinion fatally unreliable and subject to exclusion. Leitzinger offered a foundation for how and why he analyzed the data as he did. He testified at trial that subtracting the SPB corrections mirrored exactly what dealers had done in the marketplace at the time the corrections were announced. In support, he referred to three letters that dealers sent in December 1998 to three generators with unexpired contracts that contained price formulas tied to the SPB. The letters requested a modification to the contracts in light of the substantial increase in the SPB index. As Leitzinger explained at trial:

> [T]he major dealers . . . promptly sent letters to customers [i.e., generators] saying here's the change in index. We want to adjust the differential to back it out. Just because the magazine changed the index doesn't mean we are now going to pay you more money. If our contract used to be index less 20, and they just

> raised the index by $20, . . . we want it to be index less 40. So they immediately sent letters out saying we want to, in effect, unwind the increase by Scrap Price Bulletin.

(JA 1195.)

In addition, Leitzinger referenced a graph at trial that showed "roughly parallel" lines, one representing actual sale prices for processed ferrous scrap and the other representing the corresponding SPB index prices. Even Defendants' expert agreed that for the purposes of Leitzinger's analysis, it did not matter whether the SPB index accurately reflected price for processed scrap and that all that mattered was that the SPB index moved "roughly parallel" to actual prices for processed scrap. Thus, the graph provided evidence that indeed the market followed the SPB index even after December 1998 and October 1999 corrections were made and that any inaccuracies in the SPB were irrelevant so long as the index moved up and down over time parallel to actual market prices.

In sum, the jury was free to give Leitzinger's opinion little or no weight, and to credit instead Defendants' attacks on his decision to back out the adjustments. We cannot say that the district court abused its discretion in admitting Leitzinger's testimony when the record shows that he performed his analysis according to a reliable method (the "during and after" method) and reliably applied that method to the facts of this case. Moreover, Leitzinger's calculations were tested on cross-examination and subjected to further scrutiny and criticism by Defendants' own expert. *Daubert*, 509 U.S. at 593 (explaining that in analyzing the reliability of an

expert's testimony, the "key question" is "whether it can be (and has been) tested"). The question of whether Leitzinger's opinion is accurate in light of his use of the SPB data goes to the weight of the evidence, not to its admissibility, and the district court appropriately passed the torch to the jury to make this determination. *See id.* at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); *see also Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 415 n.3 (3d Cir. 2002) ("While the Federal Rules of Evidence call upon the courts to serve as gatekeepers who independently evaluate the admissibility of expert opinion testimony, they rely upon the discretion of the trial courts—not the discretion of the courts of appeals. Because the record contains *some* factual basis—albeit shaky—for [the expert's] testimony, the District Court did not abuse its discretion in performing this gatekeeping function." (internal citations omitted)).

Finally we note that the district court did not abuse its discretion by failing to hold a *Daubert* hearing, because the record on the expert testimony was extensive, and the *Daubert* issue was fully briefed by the parties. *Clay v. Ford Motor Co.*, 215 F.3d 663, 667 (6th Cir. 2000) (stating that a district court is not required to conduct a *Daubert* evidentiary hearing to qualify an expert witness). Columbia claims that the district court's opinion in response to Columbia's motion to preclude Leitzinger's testimony was cursory. We conclude that the court accurately considered the key issues, found the testimony to be sufficiently reliable by stating that Leitzinger "provided reasoned explanations" and "presented viable arguments" for his

calculations, and concluded that Columbia's attacks were most appropriate for cross-examination. We, therefore, cannot say that the district court abused its discretion.

B. Damages Award

Columbia argues that even crediting Leitzinger's testimony, there is insufficient evidence to support the damages verdict and, in any event, the verdict is an impermissible "fluid recovery."

Columbia raised this issue in its Rule 50(a) and (b) motions for judgment as a matter of law. We review a district court's refusal to grant a party's motion for judgment as a matter of law de novo. *Greene v. B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 788 (6th Cir. 2005). We have explained that the standard of review is identical to that used by the district court:

> The evidence should not be weighed, and the credibility of the witnesses should not be questioned. The judgment of this court should not be substituted for that of the jury; instead, the evidence should be viewed in the light most favorable to the party against whom the motion is made, and that party given the benefit of all reasonable inferences. The motion should be granted, and the district court reversed, only if reasonable minds could not come to a conclusion other than one favoring the movant.

Tisdale v. Fed. Exp. Corp., 415 F.3d 516, 531 (6th Cir. 2005) (quoting *Williams v. Nashville Network*, 132 F.3d 1123, 1130-31 (6th Cir. 1997)).

1. Sufficiency of the Evidence

"An antitrust plaintiff seeking treble damages under section 4 of the Clayton Act must prove an antitrust violation, fact of damage or injury, and measurable damages." *Danny Kresky Enter. Corp. v. Magid*, 716 F.2d 206, 209 (3d Cir. 1983).

Columbia argues that Plaintiffs failed to provide the jury with sufficient evidence to support the jury's finding of individual and market-wide damages. Columbia recognizes that Leitzinger opined that every class member who sold ferrous scrap incurred a 16.4 percent undercharge for every sale during the class period, resulting in aggregate damages of $20.9 million. But because the jury reached a verdict of $11.5 million in damages, Columbia argues, the jury must have resorted to speculation and conjecture to arrive at such a figure, illustrating the insufficiency of the damages evidence on damages.

Columbia's challenge to the jury's verdict on damages is therefore directed at the accuracy of the amount of damages and not the fact of damages. Columbia's argument, in essence, is that Leitzinger's testimony alone was insufficient for the jury to have accurately fixed Plaintiffs' damages.

The district court, rejecting Columbia's argument, explained:

> In sum, Leitzinger testified that, if a conspiracy to depress prices via customer allocation existed during the alleged period, it would have uniformly impacted the relevant scrap metal market, and that impact would

> have been one that was shared in common by *all* of the ferrous generators. He went on to testify that the uniform injury experienced by *all* of the ferrous class members was a 16.4% undercharge during the conspiracy period. Further, Leitzinger testified that the undercharge experienced by the named Plaintiffs specifically was 16.4% as well.
>
> . . . .
>
> *If credited,* therefore, Leitzinger's testimony clearly established evidence of injury to the named Plaintiffs and the class as a whole, and measurable damages to the named Plaintiffs and the class as a whole. . . . If the jury credited Leitzinger's conclusions—in whole or in part—it reasonably could have reached the conclusions that it did.

In re Scrap Metal, 2006 WL 2850453, at *17-18.

We agree. First, a jury is entitled to award damages in an antitrust case based on expert testimony. *See Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 572 (1990) (holding that "expert testimony . . . provided a sufficient basis for an acceptable estimate of the amount of damages"). Second, "[t]he antitrust cases are legion which reiterate the proposition that, if the fact of damages is proven, the actual computation of damages may suffer from minor imperfections." *South-East Coal Co. v. Consol. Coal Co.*, 434 F.2d 767, 794 (6th Cir. 1970). Once liability is established, therefore, a plaintiff's proof of damages is evaluated under a more lenient standard. *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 567

(1981). As the Supreme Court has stated in explaining its "traditional rule excusing antitrust plaintiffs from an unduly rigorous standard of proving antitrust injury," *id.* at 565, "it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted." *Id.* at 566-67 (quoting *Hetzel v. Baltimore & Ohio R.R.*, 169 U.S. 26, 39 (1898)). "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). Further, "the fact that the jury chose to assess damages in an amount substantially below that recommended by plaintiff's expert does not mean that the evidence offered in support of lost profits was inadequate as a matter of law." *Falls Steel Tube & Mfg. Co. v. Trumark, Inc.*, No. 94-3981, 1995 WL 750541, at *3 (6th Cir. 1995) (per curiam) (explaining that even though defendant identified weaknesses in the evidence of damages, "we do not find it to be so 'speculative or remote' that the matter should have been taken from the jury"). *See also Rodney v. Nw. Airlines, Inc.*, 146 F. App'x 783, 791 (6th Cir. 2005) ("A plaintiff need not calculate a specific damage figure so long as he proposes an acceptable method for calculating damages.").

We conclude that Leitzinger's testimony is sufficient to support the jury's damage award.

2. Fluid Recovery

Columbia further argues that the jury's verdict represents an "impermissible fluid recovery" because the jury was only permitted to return a lump-sum verdict for ferrous generators as a group without determining the damages incurred by individual class

members. Columbia's argument again is premised on its disagreement with Leitzinger's finding that every ferrous scrap sale in the class period had been depressed at the same rate (16.4 percent). Because the jury returned a verdict in an amount less than Leitzinger's estimated damages, Columbia argues that there is no basis for concluding that the jury accepted Leitzinger's premise that the alleged conspiracy had a uniform impact. In other words, Columbia states that it is impossible to figure out how the jury reached its verdict or to which class members the verdict applies and in what amounts. Columbia therefore asserts that the verdict is an impermissible fluid recovery.

Columbia, however, confuses the concept of fluid recovery with aggregate damages. "Fluidrecovery refers to the distribution of unclaimed or unclaimable funds to persons not found to be injured but who have interests similar to those of the class." *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 525 (S.D.N.Y. 1996). *See also Schwab v. Philip Morris USA, Inc.*, No. CV 04-1945, 2005 WL 3032556, at *1 (E.D.N.Y. 2005) ("Recoveries described as 'fluid' include distribution of damages through price reductions rather than by cash to individual plaintiffs; distribution of settlement or damage funds left unclaimed by individuals to nonprofit organizations or to states for uses intended to benefit class members; and distribution of damages calculated on a classwide basis to individual plaintiffs or through various indirect means." (internal citations omitted)). Indeed, the cases on which Columbia relies involved scenarios where damages could not be returned to any meaningful number of class members, and the plaintiffs accordingly proposed a fluid recovery.

Here, Plaintiffs did not propose a fluid recovery; instead they provided evidence of a classwide *aggregate* injury. "Damages in an antitrust class action may be determined on a classwide, or aggregate, basis, without resorting to fluid recovery where the [evidence] . . . provide[s] a means to distribute damages to injured class members in the amount of their respective damages." *In re NASDAQ*, 169 F.R.D. at 526. Leitzinger produced evidence supporting an aggregate recovery because *each* Plaintiff suffered a 16.4 percent undercharge. Leitzinger testified that the scrap metal market was well-functioning so as to distribute the effect of an antitrust violation equally across class members. The jury accepted Leitzinger's uniform-impact theory and awarded aggregate damages based on the injury to each class member. That the jury awarded a lower amount than Leitzinger suggested does not mean that it rejected Leitzinger's uniform-impact theory; instead, the jury may have simply rejected the undercharge amount of 16.4 percent.

C. Class Certification

Columbia argues that the district court erred in certifying a class and allowing the trial to proceed as a class action because (1) the "predominance of common questions" requirement of Rule 23(b)(3) was not met, and (2) Plaintiffs did not satisfy the notice requirement of Federal Rule of Civil Procedure 23(c)(2)(B). "The district court's decision *certifying* the class is subject to a 'very limited' review and will be reversed 'only upon a strong showing that the district court's decision was a clear abuse of discretion.'" *Olden v. LaFarge Corp.*, 383 F.3d 495, 507 (6th Cir. 2004)

(quoting *Armstrong v. Davis*, 275 F.3d 849, 867 (9th Cir. 2001)).

1. Predominance of Common Questions

Columbia contends that Plaintiffs did not meet the "predominance of common questions" requirement of Rule 23(b)(3) because damages could not be calculated on a class-wide basis.

In addition to the prerequisites of Rule 23(a)—numerosity, commonality, typicality, and fair representation—Rule 23(b) requires that (1) questions common to the class predominate over questions affecting only individual members, and (2) class resolution is superior to alternative methods for adjudicating the controversy. Fed. R. Civ. P. 23(b)(3). Put differently, the proposed class must be "sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

Columbia erroneously assumes that the issue of damages must predominate. To the contrary, "[p]redominance is a test readily met in certain cases alleging . . . violations of the antitrust laws," *Amchem*, 521 U.S. at 625, because proof of the *conspiracy* is a common question that is thought to predominate over the other issues of the case. 7AA Wright & Miller § 1781. Indeed, we have never required a precise mathematical calculation of damages before deeming a class worthy of certification. *See Olden*, 383 F.3d at 508 (affirming class certification where liability could be determined for the class as a whole, despite individual issues of damages). Thus, even where there are individual variations in damages, the

requirements of Rule 23(b)(3) are satisfied if the plaintiffs can establish that the defendants conspired to interfere with the free-market pricing structure. *See Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) ("[T]he mere fact that questions peculiar to each individual member of the class action remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action isimpermissible.").

Here, the district court found that the "*allegations* of price-fixing and market allocation . . . will not vary among class members." (JA 263 (emphasis added).) Accordingly, the court found that the "fact of damages" was a question common to the class even if the amount of damages sustained by each individual class member varied. *See Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564 (6th Cir. 2007) ("[c]ommon issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues") (quoting *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 139 (2d Cir. 2001)); *see also Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977) (explaining that although damages calculation in antitrust action may involve some individualized issues, "it has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate"). We, therefore, find no error in the district court's analysis.

2. Notice

Columbia next argues that Plaintiffs failed to inform sufficiently absent class members of "the

binding effect of a class judgment." Fed. R. Civ. P. 23(c)(2)(B). In April 2004, the district court issued a Notice of Class Determination and Proposed Partial Settlements (hereinafter, "Notice"). Columbia did not object to this Notice until January 2006, three days before the scheduled trial. Without commenting on Columbia's dilatory decertification motion, we conclude that the district court did not abuse its discretion in determining that the Notice was adequate.

In three distinct places, the Notice informed class members of the effects of remaining a member of the class. First, contrary to Columbia's contention that the Notice focused exclusively on the agreements with the settling defendants, it concisely and clearly informed class members that "[w]hether or not the settlements . . . are approved, the litigation will continue against the non-settling defendants." (JA 283.) Second, the Notice specified the binding effect of both the proposed settlement and any future lawsuit by advising class members of the need to opt out in order to "pursue any claims against any defendants." (JA 283.) Third, the Notice informed the class members that by opting out of the class and the proposed settlements, they would not be bound by a judgment: "You will be excluded from the Class Plaintiffs' prosecution of the claims against all defendants . . .[and] you may present any claim you may have against . . . any other defendant by filing your own lawsuit." (JA 291-92.) Thus, the Notice was adequate in form and content to satisfy the requirements of the Federal Rules and due process. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (class notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and

afford them an opportunity to present their objections").

D. Jury Instructions

Columbia contends that the trial court erred when it instructed the jury on tolling and the applicable statute of limitations. We review a district court's jury instructions for abuse of discretion. *United States v. Ross*, 502 F.3d 521, 527 (6th Cir. 2007). "A judgment may be reversed based upon an improper jury instruction only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." *Id.* (internal quotations and citations omitted).

Antitrust actions are subject to a four-year statute of limitations, meaning of course, that suit must be brought within four years after the cause of action accrued. 15 U.S.C. § 15(b). A cause of action, however, does not necessarily "accrue" when the defendant commits the act causing the plaintiff's injury, but may be tolled until the plaintiff discovers or should have discovered the injury. *See Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 338 (1971). For instance, acts of fraudulent concealment by the defendant toll the limitations period for as long as the concealment continues. *Norton Children's Hosp., Inc. v. James E. Smith & Sons, Inc.*, 658 F.2d 440, 443 (6th Cir. 1981). In addition, pursuant to 15 U.S.C. § 16(i), the limitations period is tolled during the pendency of related criminal or civil proceedings by the government, plus an additional one-year period thereafter.

Plaintiffs filed suit on August 15, 2002. Columbia asserts, therefore, that August 15, 1998 is the date on

or after which Plaintiffs must establish Columbia's participation in the alleged conspiracy. The district court, however, suspended the limitations period pursuant to 15 U.S.C. § 16(i) and instructed the jury that it could consider Defendants' acts four years prior to March 2000, based on ongoing, related government proceedings beginning at that time. The district court's ruling meant that the jury could consider Defendants' conduct as of March of 1996. The district court also gave a fraudulent concealment instruction allowing the jury to alter further the dates in consideration, if it found the requisite elements. Columbia claims that both of these instructions were erroneous. Because we conclude that the jury could have reached the verdict based on the fraudulent concealment theory, we do not reach Columbia's objection to the statutory tolling instruction.

The district court gave the following fraudulent concealment instruction:

> To establish fraudulent concealment as to a specific defendant in this case, plaintiffs must prove each of the following elements by a preponderance of the evidence:
>
> (1) First, that the members of the conspiracy actively concealed the alleged conduct that caused plaintiff's antitrust injuries. It is not enough for plaintiffs to show that the members of the conspiracy failed to disclose the alleged conduct; rather plaintiffs must prove that they took active and affirmative steps to prevent plaintiffs from learning about the alleged conduct, such as by keeping their

meetings or agreements secret from their accounts or taking steps to conceal the fact of their non-competition; and

(2) Second, that plaintiffs failed to discover the fact of the unlawful conspiracy; and

(3) Third, that plaintiffs exercised reasonable diligence in the circumstances and still did not discover the alleged conduct.

In deciding whether plaintiffs have proved fraudulent concealment by the alleged conspirators, you may consider a number of factors. First, the law recognizes that a conspiracy is, by nature, self-concealing. Thus, you may consider the very acts giving rise to the conspiracy when deciding whether it was concealed from the plaintiffs; there is no requirement that the affirmative acts of concealment be independent of the conspiracy itself. You may also consider other activities which operate to conceal anti-competitive conduct such as prearranged or phone bids, confining knowledge of any anti-competitive activity to a limited core group of individuals, engaging in clandestine meetings or using false identities . . . .

[A]s with other acts in a conspiracy, any affirmative acts of concealment by one conspirator are chargeable to all you find to have been members of the conspiracy. Similarly, plaintiffs need not establish concealment on a victim-by-victim basis; affirmative acts of

> concealment generally are considered to have an industry-wide effect.
>
> If you find that plaintiffs have proven each of the elements of fraudulent concealment, then you may find that the doctrine of fraudulent concealment applies to plaintiffs' claims. In that event, plaintiffs may then seek to recover damages from the date of the earliest injury that you find they suffered, if any. If you find that plaintiffs have *failed to prove any one of these elements*, then you are *limited to the post-March 1996 time period* outlined in the previous "affirmative defense" instruction.

(JA 1033-34.) Columbia argues that the court erred by instructing the jury, in the foregoing emphasized language, that it could find fraudulent concealment or apply statutory tolling (with the earliest date of consideration in March 1996), instead of stating that the jury could find fraudulent concealment, statutory tolling, *or* find that *neither* applied (meaning the earliest date of consideration would be August 1998). Because the jury heard evidence based upon which it could have found fraudulent concealment even *before* 1996 and lasting through 1998, we conclude that any error in the jury instructions is harmless. *See United States v. Rayborn*, 491 F.3d 513, 520 (6th Cir. 2007) ("Even assuming *arguendo* that the instruction was given in error, 'a legally-erroneous jury charge will not justify reversal of a conviction if its probable effect on the verdict was inconsequential.'") (quoting *United States v. Carney*, 387 F.3d 436, 449 (6th Cir. 2004)).

Columbia argues that some of the evidence of fraudulent concealment should not apply to it because

it was based on acts taken by other Defendants. Fraudulent concealment, however, may be established through the acts of co-conspirators. *See Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1493 (D.C. Cir. 1989) ("affirmative acts of concealment by one or more of the conspirators can be imputed to their co-conspirators for purposes of tolling the statute of limitations"); *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1084-85 (2d Cir. 1988) (same). Columbia cites no authority to support its argument that fraudulent concealment must be shown in relation to each plaintiff in a class action.

Finally, Columbia argues that the district court erred by instructing that "the law recognizes that a conspiracy is, by nature, self-concealing." Indeed, in the law of this Circuit, a plaintiff seeking to invoke the doctrine of fraudulent concealment in order to toll the statute of limitations in an antitrust case must prove "affirmative acts" of concealment; "concealment by mere silence is not enough." *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1467 (6th Cir. 1988) (citation omitted). The district court's instruction, however, stated accurately this standard in its instruction: "It is not enough for plaintiffs to show that the members of the conspiracy failed to disclose the alleged conduct; rather plaintiffs must prove that they took active and affirmative steps to prevent plaintiffs from learning about the alleged conduct . . . ." (JA 1033.)

Therefore, we find no abuse of discretion.

III. CONCLUSION

For these reasons, we **AFFIRM**.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 06-4511

[Filed May 15, 1008]

In re: SCRAP METAL	)
ANTITRUST LITIGATION	)
	)

Before: BATCHELDER, COLE, and SUTTON, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED in its entirety.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CASE NUMBER: 1:02CV844

[Filed February 10, 2006]

PROFILE GRINDING, et al.,)
)
v.)
)
COLUMBIA NATIONAL)
GROUP, et al.)
)

JUDGMENT IN A CIVIL CASE

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

It is ordered and adjudged that judgment is hereby entered in favor of the plaintiffs and against defendant Columbia Iron & Metal Company in the amount of $23,036,000.00 ($11,500,000.00 trebled per 15 U.S.C. 15(a) to $34,500,000.00, then offset by $11,464,000.00 per other settlements). Plus fees and costs, to be

determined through post-judgment submissions relating thereto.

February 10, 2006	Geri M. Smith
Date	*Clerk*

/s/_____
(By) Deputy Clerk Christine M. Huth

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-4511

[Filed October 20, 2008]

IN RE: SCRAP METAL ANTITRUST LITIGATION)

ORDER

BEFORE: BATCHELDER, COLE, and SUTTON, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

* Judge Moore recused herself from participation in this ruling.

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green
Clerk

APPENDIX D

15 U.S.C. § 1

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 15(a)

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest. Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a

reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

* * *

15 U.S.C. § 15b

§ 15b. Limitation of actions

Any action to enforce any cause of action under section 4, 4A, or 4C [15 USCS §§ 15, 15a, 15c] shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

15 U.S.C. § 16(i)

§ 16. Judgments

* * *

(i) Suspension of limitations. Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A [15 USCS § 15a], the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 or 4C [15 USCS §§ 15, 15c] is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

APPENDIX E

Fed. R. Civ. P. 23 (b)(3), (c), (d) and (e)

Rule 23. Class Actions

* * *

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * *

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) *Certification Order.*

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must

clearly and concisely state in plain, easily understood language:

(i) the nature of the action;
(ii) the definition of the class certified;
(iii) the class claims, issues, or defenses;
(iv) that a class member may enter an appearance through an attorney if the member so desires;
(v) that the court will exclude from the class any member who requests exclusion;
(vi) the time and manner for requesting exclusion; and
(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require--to protect class members and fairly conduct the action--giving appropriate notice to some or all class members of:

(i) any step in the action;
(ii) the proposed extent of the judgment; or
(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

* * *

APPENDIX F

Jury Instruction on Statutory Tolling

In this case, the law imposes a four year limit on the plaintiffs' claim, which limit dates backward from March of 2000. Thus, unless the statute of limitations is tolled or extended for the reasons described in the Court's next instruction [on fraudulent concealment], the plaintiff may only prevail ... in the alleged conspiracy on or after March of 1996, and may only recover damages arising from conduct occurring after that date.